Deep Harbour

Hong Kong, a key maritime hub at the crossroads of global trade, has long navigated the waters of East-West relations. Leased to Britain for 99 years, its colonial past shaped a legal system rooted in the rule of law, providing stability and economic surety. When British rule ended in 1997, Hong Kong was handed back to China under the "one country, two systems" framework, preserving judicial independence. However, recent political storms and growing influence from Beijing have raised concerns about whether its legal system can stay afloat amid mounting challenges to its autonomy.

At 11:59pm on 30 June 1997, the flags of the United Kingdom and British Hong Kong were lowered together for the last time to the tune of the British National Anthem, "God save the Queen"

Millions of people in Hong Kong, China and around the world tuned into the globally televised event, which officially marked the end of 156 years of British colonial rule in Hong Kong.

A few moments later, as the clock ticked past midnight on 1 July 1997, the world watched in anticipation as the flags of the People's Republic of China and the new flag of the Hong Kong Special Administrative Region (Hong Kong SAR) were synchronically raised together to the Chinese National Anthem, "March of the Volunteers."

The Prince of Wales, Prince Charles, as he then was, gave a speech on behalf of Queen Elizabeth II. "This important and special ceremony marks a moment of both change and continuity in Hong Kong's history.

"It marks … the restoration of Hong Kong to the People's Republic of China under the terms of the Sino-British Joint Declaration … after more than 150 years of British administration. This ceremony also celebrates continuity because by that same treaty … the Hong Kong Special Administrative Region will have its own government and retain its own society and economy …," he said.

He praised Hong Kong as an example of how the "East and West can live and work together" and reinforced that "within the framework of 'one country, two systems', it will continue to have a strong identity of its own … ."

Jiang Zemin, then-President of the People's Republic of China, also gave a speech at the handover ceremony. Jiang was the first leader of China to visit Hong Kong in over 150 years. "At this moment, people of all countries in the world are casting their eyes on Hong Kong," he said.

He described the handover as a "victory for the universal cause of peace and justice."

"July 1st 1997 will go down in the annals of history as a day that merits eternal memory. The return of Hong Kong to the motherland after going through a century of vicissitudes indicates that from now on, the Hong Kong compatriots have become true masters of this Chinese land…," he said.

The people of Hong Kong and the world were assured that there would be a high degree of autonomy under 'one country, two systems', and the economic system and way of life wouldn't change.

To understand where Hong Kong is today, it is necessary to look back at the development of this incredible port and the history of relations between China and Britain.

Hong Kong: fusion of the East and the West

Hong Kong possesses a rich history that can be traced back to the New Stone Age. Archaeologists have uncovered pottery, rings and bronzes from Neolithic times. Han Dynasty tombs have been found in Kowloon, along with graves dating back to the fourth century AD.

Given its important and strategic location in the region, Hong Kong has historically been a trading hub between the East and the West. In the 19th centuries, Britain and China engaged in extensive trade. Chinese products like silk, porcelain and tea were extremely popular in Britain however Chinese merchants did not want to purchase British goods and preferred to trade with silver.

"Article 158 creates a delicate balance between the courts of Hong Kong that traditionally have the power to interpret laws including the constitution document and the power of the mainland to control how a national law such as the Basic Law … is interpreted"

PROFESSOR BING LING, UNIVERSITY OF SYDNEY LAW SCHOOL

To fix the trade imbalance between the countries, Britain started growing opium in its Indian colonies and exported it to China where it quickly gained popularity. Opium addition quickly spread throughout the population. To eradicate the social and economic disorder it caused, opium was eventually banned in China. However, British traders continued to unlawfully smuggle opium into China.

In September 1839, war broke out between Britain and China over trade. In 1842, with its superior war power, Britain won the war. China's defeat resulted in the Treaty of Nanjing. Under the terms of the treaty, Hong Kong island was relinquished to Britain in perpetuity. The treaty granted the British free trade and China was compelled to pay damages for the opium that it had destroyed.

Despite the already favourable terms, Britain pressed to renegotiate the terms of the treaty. The Second Opium War broke out in 1856 and China was defeated again.

The area north of Hong Kong, known as "Kowloon," was relinquished to Britain.

Unlike the previous agreements where land was ceded to Britain in perpetuity, China and the United Kingdom entered into the Convention for the Extension of Hong Kong Territory in 1898 which granted Britain a 99-year lease of the New Territories from China. Significantly, the lease expired in 1997.

Turning of the tide: 1800s to the 1980s

Adjunct Professor Jocelyn Chey AM at Western Sydney University and former Consul-General for Australia in Hong Kong (1992 - 1995) describes Hong Kong in the 1960s as being very colonial. "There was a European expat community that had very little to do with the Chinese community… it was really run by the Brits for the Brits," she says.

In the 1970s and 1980s, China underwent major economic and political reforms. Its position and power changed drastically throughout the 20th century, and it was no longer the same China that lost to the British in both Opium wars. Britain also experienced great change. In the 19th century, Britain was a strong and dominant superpower on the world stage. However, by the 20th century it had lost much of its empire and its power and role on the global stage had greatly weakened.

The opposite was true of China."[I]n the later part of the 20th century, it's a major global player in just about every sphere so Britain wasn't really in a position to

"There's a high degree of autonomy [in Hong Kong], [but] there's still accountability including a legal accountability..."

ASSOCIATE PROFESSOR STEPHEN THOMSON, AUSTRALIAN NATIONAL UNIVERSITY COLLEGE OF LAW

push China around anymore," explains Associate Professor Stephen Thomson from the ANU College of Law at the Australian National University.

In the 1970's, as the question of Taiwan loomed, China perceived Taiwan as being part of China but a self-governing region and it considered how to incorporate Taiwan back under Chinese sovereignty.

Former Chinese leader Deng Xiaoping is credited with inventing the "one country, two systems" idea.

"[The idea was to] have one country, which would be China, but we can have two systems within it which would be a mainland system and a Taiwanese system," says Thomson. When the question of Hong Kong arose, the "one country, two systems" model was used.

"So although 'one country, two systems' is most commonly associated with Hong Kong, it was actually devised for Taiwan originally," explains Thomson.

The Sino-British Joint Declaration

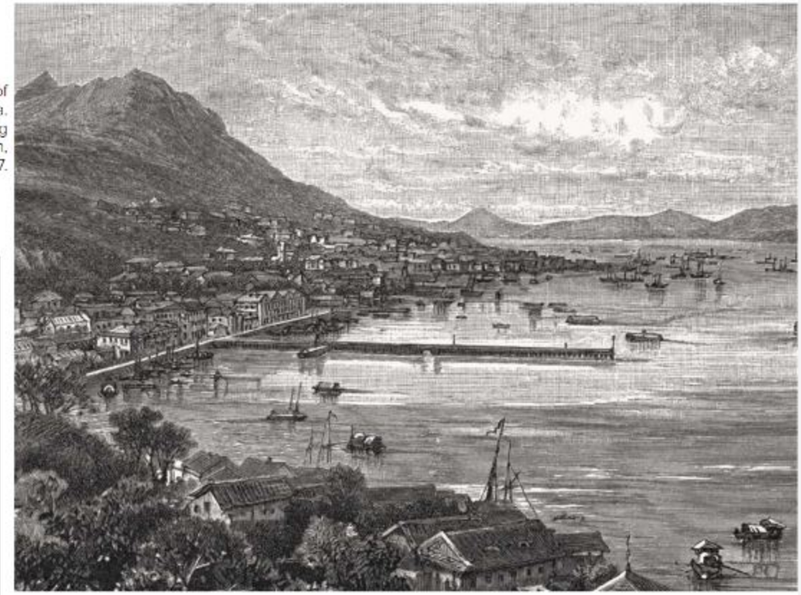
In the late 20th century, as the end of the 99-year lease period became imminent, Britain and China commenced treaty negotiations for the return of Hong Kong to China. After lengthy negotiations between the two nations, the Sino-British Joint Declaration on the Question of Hong Kong (The Joint Declaration) was signed between Britain and China on 19 December 1984.

The Joint Declaration is crucial as it sets out the basic policies of the People's Republic of China regarding Hong Kong. It formed the basis for the Basic Law and the principle of "one country, two systems." Under the Joint Declaration, China was required to guarantee Hong Kong's way of life and its "high degree of autonomy for a period of 50 years," says Thomson.

While the terms of the handover were determined and agreed to in theory, there were various practical difficulties that had to be overcome. After a century of British rule, Hong Kong had its own legal system and processes. It operated under a common law system and many of its laws and legal processes and procedures were in English. It also had a different constitutional and political system to China.

Since the colonial period, the judiciary in Hong Kong has retained its independence. "Hong Kong was to have a power of constitutional review. Hong Kong courts could constitutionally review executive decisions [and] legislative acts. There was no equivalent to that in mainland China.," says Thomson.

Below: The signing and sealing of the Treaty of Nanking. Courtesy of the Anne S. K. Brown Military Collection. Painted by Captain John Platt, Bengal Volunteers. Engraved by John Burnet, 1846.



Historical view of Hong Kong, China. Wood engraving after a photograph, published in 1897.

The Basic Law strived to protect the rights and autonomy of Hong Kong. Its people and institutions enjoyed a degree of freedom that was unrivalled on the mainland.

Basic Law and the entrenchment of rights

The Basic Law is a legal document and is adopted as a national law in China.

It sets out the basic foundations that guaranteed the rights and freedoms of the people in Hong Kong. As Jiang stated in his speech at the handover ceremony in 1997, the Basic Law sought to protect the status quo in Hong Kong by ensuring that "the previous capitalist system and way of life shall remain unchanged for 50 years" (Article 5).

The Basic Law sought to preserve the rule of law in Hong Kong by ensuring that "all Hong Kong residents shall be equal before the law" (Article 25).

Article 2 of the Basic Law states "The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication … ."

Despite the different legal systems, "It is quite clear that Hong Kong's judiciary enjoys judicial independence in the handling of cases," says Professor Bing Ling from the University of Sydney Law School.

Article 19 of the Basic Law says "The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication." Significantly, Article 19 confirms that the Hong Kong SAR has no jurisdiction over "acts of state such as defence and foreign affairs". The provision specifically states that the courts "shall obtain a certificate from the Chief Executive on questions of facts concerning acts of state…" and before the certificate is issued, the Chief Executive "shall" obtain a certifying document from the Central People's Government. The certificate is binding on the courts.

Chapter II of the Basic Law clearly sets out the relationship between the Central People's Authorities and Hong Kong SAR.

The Basic Law set out the functions and powers of each arm of government, consistent with the principles of the rule of law and guaranteed protection of human rights consistent with Hong Kong's obligations under international treaties such as the *International Covenant on Civil and Political Rights* (Articles 4, 11, and the provisions contained under Chapter III of the Basic Law).

Interpretation and amendment of the Basic Law: Articles 158 and 159

In Australia, the *Constitution* sets out the powers of each arm of government (Chapters I, II and III respectively). Each arm of government has its own role and function to perform.

"China doesn't have a separation of powers as it will be understood in a western sense," says Thomson. "There is a debate, which has been going on in Hong Kong for some time about whether Hong Kong has a separation of powers model, or … an executive-led model," he says.

Thomson argues that Hong Kong possesses a separation of powers model, however it is an executive-led model. "[It is] an inheritance of the British colonial model for governing Hong Kong. The paradox is that in some ways, Hong Kong has a more defined separation of powers now than it had under British rule," he says.

Articles 158 and 159 of the Basic Law are important because "they relate to how the system, 'one country, two systems' model and Hong Kong's autonomy will operate in practice and can be sustained in the long term," says Ling.

The Hong Kong courts have the power to interpret and decide cases "within the limits of the autonomy of the Region."

Article 158 gives the power or the authority to give legally authoritative interpretations of the Basic Law to the Standing Committee of the National People's Congress (Standing Committee). The Standing Committee possesses broad powers including the power to interpret any provision in the Basic Law and it can issue an interpretation at its

discretion without any prompting or referral by the courts in Hong Kong.

According to Ling, "Article 158 creates a delicate balance between the courts of Hong Kong that traditionally have the power to interpret laws including the constitution document and the power of the mainland to control how a national law such as the Basic Law … is interpreted."

The intention was that the Hong Kong judiciary can interpret the Basic Law independently. However, if the matter relates to mainland China, its power, the responsibility of the Central Government, or the relationship between Hong Kong and mainland China, then the matter is to be referred to Beijing and the Standing Committee.

The Basic Law states that there are certain matters which are under the ambit of Beijing's authority. For instance, the Central Government is responsible for matters pertaining to foreign affairs, defence and so forth.

The court in Hong Kong can only interpret the Basic Law when there is a case before them which requires them to exercise this power, and it must be a matter which is within the ambit of the Hong Kong SAR.

If the matter relates to a subject matter that falls outside the autonomy of the region, such as defence, then the courts are obligated to refer the matter to the Standing Committee for interpretation. "That interpretation will be used by the courts, as part of its case, to make a final judgment," explains Thomson.

The method by which Beijing interprets the Basic Law is different to a court in a common law jurisdiction.

"The system in Beijing is called legislative interpretation….[T]he legislature, it's not a court … interprets the law," says Ling.

"China doesn't have a separation of powers as it will be understood in a western sense"

He explains that the legislators in the Standing Committee are not lawyers, they are lawmakers who are supported by legal staff. "There is no process in which interested parties can make their submissions and debate among themselves. … [I]t is a process that is not transparent … it is a process that does not involve public participation, especially participation by Hong Kong's legal profession," says Ling.

Ling points out that it is a system that is fundamentally different from the common law process in that the Standing Committee's interpretations are binding and become part of Hong Kong law. The "process therefore has had [an] impact on Hong Kong's common law tradition and Hong Kong's rule of law," he says.

According to Ling, the Standing Committee in Beijing has interpreted the Basic Law five times since the Joint Declaration was entered into in 1984. One instance was on referral from Hong Kong's Court of Final Appeal and the other four instances were on Beijing's own initiative.

While the judiciary has engaged in judicial review of legislation since colonial times, the courts have made it clear that they have no power to review or strike down laws made by mainland China to be applied in Hong Kong such as the National Security Law.

Article 159 of the Basic Law relates to the power of the National People's Congress to amend the Basic Law. This has been adopted as a national law of China and the provision is "unique" as it is an "entrenchment provision which essentially says there are certain provisions of the Basic Law that cannot be amended," says Ling.

For instance, provisions relating to Hong Kong's autonomy, judicial independence, rights and freedoms of individuals, cannot be amended.

Constitutional obligation to enact national security law

The implementation of national security legislation is not a novel concept. Each nation around the world has enacted their own security laws to protect their national security.

In Australia, section 51 of the *Constitution* states that the Commonwealth Parliament has the power to legislate with respect to the defence of Australia.

The *Criminal Code Act 1995* (Cth) contains a number of provisions relating to terrorism and penalties include imprisonment of up to 25 years. For acts of treason or treachery, the punishment is imprisonment for life.

There is also the *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) (the Act). The Act relates to the protection of certain information from disclosure in federal civil and criminal proceedings where it is likely to "prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice."

Where the matter relates to national security, transparency, due process and the rule of law become murky.

In 2018, an Australian man known by "Witness J", also known as "Alan Johns", was tried, sentenced and imprisoned in a trial cloaked by secrecy as the matter pertained to national security.

Article 23 of the Basic Law provides that Hong Kong SAR "*shall* enact laws on its own to prohibit any act of treason, secession, sedition, and subversion against the Central People's Government … ." The word "shall" is used in lieu of a more discretionary term such as "may".

With respect to implementing a national security law, "there was a duty incumbent upon Hong Kong to do this," says Thomson.

When the Basic Law was drafted, Hong Kong had not enacted its own national security legislation. After the handover, the Hong Kong government tried to in 2002 but was unsuccessful.

Chey says when the mainland eventually enacted national security legislation for Hong Kong, it was consistent with its obligations under the Basic Law. "[I]t's not possible, as many commentators do, to say that it was another example of China riding roughshod over the people of Hong Kong and imposing this legislation…. [T]here is a historical background to it that has to be taken into account," says Chey.

2019: Civil unrest in Hong Kong

In June 2019, protests broke out in Hong Kong over a controversial extradition bill. The bill, introduced in April that year, proposed to permit the extradition of individuals to mainland China and countries or regions it did not have an extradition treaty with, including Taiwan and Macau. There were fears the bill could undermine judicial independence and put dissenters at risk.

Hostility between protestors and police escalated, leading to frequent and violent clashes.

On 1 July 2019, protestors broke into, vandalised, damaged and occupied the Legislation Council building. Hundreds of protestors raided and defaced the interior with anti-government and anti-China slogans. Shortly after, the government announced it would withdraw the bill. However, significant unrest continued.

On 1 October 2019, the 70th anniversary of the founding of the People's Republic of China, an 18-year-old male protestor was shot by police with a live round. Thomson was working in Hong Kong in 2019. "My university was completely shut down … It was a battleground between students and the police. The place was smashed up. It was a very unsettling time.

"Beijing was very worried about Hong Kong being a base for sentiments which might spread into mainland China. … [W]ho could be surprised that they would be concerned about that? There was pretty widespread disorder in Hong Kong at that time," he said.

Obligation to implement national security legislation

In the aftermath of the 2019 protests in Hong Kong, the Standing Committee passed the *Law of the People's Republic of China on Safeguarding National Security*

Since the National Security Law was implemented in 2020, a number of foreign judges on Hong Kong's Court of Final Appeal have resigned.

in the Hong Kong Special Administrative Region (*National Security Law*) on 30 June 2020.

The aim of the law was to prevent, stop and punish acts including secession, subversion of state power, terrorist activities and collusion with a foreign country or with external elements to threaten national security.

Legal experts have pointed out that the Hong Kong Government is accountable to the Central People's Government in Beijing, under the Basic Law. "There's a high degree of autonomy [in Hong Kong], [but] there's still accountability including a legal accountability," says Thomson.

The *National Security Law* attempts to balance the need for national security legislation with Hong Kong's obligations under international conventions, Article 4 of the *National Security Law* states that "Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region… ." It seeks to protect the rights and freedoms under the Basic Law and the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Article 5 states that "The principle of the rule of law shall be adhered to in preventing, suppressing and imposing punishment for offences endangering national security."

In March 2024, the Hong Kong Government passed the *Instrument A305 Safeguarding National Security Ordinance* (*National Security Ordinance*). The *National Security Ordinance* covers a range of offences including treason, insurrection and incitement to mutiny, unlawful disclosure or theft of state secrets, espionage, sabotage and external interference.

"The *National Security Law* was a big clampdown … on free speech, freedom of expression. That's not to say that there were not legitimate concerns to be addressed from a national security perspective, but it's a heavy-handed clampdown," says Thomson. "There are all kinds of provisions in there which are very concerning from a rule of law perspective, [such as] a presumption against bail being granted for example," he says.

The penalties range from three to ten years imprisonment.

While there was always an expectation that Hong Kong was going to impose its own national security law, it drew criticism over how the law was passed and implemented.

Ling says there is an important distinction between national security and defence.

"The Basic Law does not contain an express provision stating that national security is a matter for the central government however defence is … by defence, the Basic Law is talking about the military, the military defence of the region against foreign possible invasion or intervention.

"National security, on the other hand, under the Basic Law was clearly delegated to Hong Kong … if you look at the Basic Law … the argument could be made … the National Security Law is meant to be a local affair," says Ling.

There is apprehension over provisions in the *National Security Law* from a rule of law perspective.

For instance, the "presumption against bail being granted … multiple people being tried at the same time with very short notice with very long sitting hours for courts … cases being tried by a list of specially appointed judges on a national security list that is not made public… all of these kinds of issues represent a quite heavy handed clampdown," says Thomson.

There were also questions as to whether a person accused of national security offences would be afforded the same protections in the criminal justice system consistent with the rule of law and the transparency of the legal process.

And given the vagueness of the wording in some offences, there is a lack of certainty as to "whether a particular statement and a particular act would or would not be regarded as criminal," says Thomson.

The extraterritorial reach of the offences has prompted some activists from Hong Kong to move overseas as the *National Security Law* has "universal jurisdiction."

"So, if you are sitting in Australia and you make comments which would be regarded as violating provisions of those national security laws as they relate to Hong Kong, that's regarded as an offence…" he says.

Hong Kong Court of Final Appeal

Since the handover in 1997, Hong Kong's courts have continued to review legislation inconsistent with the Basic Law. However, if the matter pertains to legislation made by mainland China to be applied in Hong Kong, such as the *National Security Law*, the courts have made it clear that they lack the power to review or strike down those laws.

Since the National Security Law was implemented in 2020, a number of foreign judges on Hong Kong's Court of Final Appeal, Hong Kong's highest Court of Appeal, have resigned from the Court. Some of the judges have expressed concerns over the status of the rule of law in Hong Kong.

Three of the foreign non-permanent judges resigned in 2024 citing different reasons for their departure. Lord Sumption, former Justice of the Supreme Court of the United Kingdom and a non-permanent judge of the Court of Final Appeal (2019 - 2024), has been vocal in stating his reasons for departure and in expressing his concern over the rule of law in Hong Kong.

Currently four Australian judges remain on the Court of Final Appeal as non-permanent judges. Three are former Justices of the High Court of Australia.

"It's not possible, as many commentators do, to say that it was another example of China riding roughshod over the people of Hong Kong and imposing this legislation. There is a historical background to it that has to be taken into account"

ADJUNCT PROFESSOR JOCELYN CHEY AM, WESTERN SYDNEY UNIVERSITY AND FORMER CONSUL-GENERAL FOR AUSTRALIA IN HONG KONG

September 2019: Hostility between protestors and police escalated, leading to frequent and violent clashes.

Democracy and the rule of law

One of the quintessential hallmarks of a democratic society is the existence of the rule of law.

According to Dane Luo, Doctor of Philosophy candidate at Oxford University, "the rule of law is about the fundamental concept that no person is above the law … that I would take to include the Prime Minister, the Premier, the King. … Every person is subject to the law. The law is made with the input of the people.

"The law is applied equally without respect to persons … it must be applied by an independent and impartial judiciary. The independent and impartial judiciary that we have in Australia is the cornerstone of the rule of law. It is the most important guardian of the rule of law because it ensures that the law is applied to everyone," he says.

He gives the example of the Uniform Civil Procedure Rules. "It applies to unrepresented litigants … and the big corporations … and that means it's the same law that applies to everyone and that's extremely important," he says.

Luo points out that there are other aspects to the rule of law including that the laws should be clear, open, accessible and predictable.

"I think it is crucial, as part of the democratic process, as part of the process of lawmaking, that the government seeks to ascertain as many views as possible [and] takes a proactive approach to listening," he says.

Transparency includes clarity of the legal process and penalties.

The penalties for breach of the *National Security Law* are prescribed by law. Whilst Hong Kong does not have the death penalty, the courts have tried to clarify how different levels of penalty will apply.

Ling gives the example of the crime of subversion and how it is being applied to the trials of the 'Hong Kong 47' those accused of organising a primary election in 2020 and charged with subversion. 45 of the 47 individuals were convicted but their sentences are yet to be announced.

As Ling points out, "the law states that for leading figures or those who played a major role in the crime, the penalty is more than ten years' imprisonment and for those who played a secondary role, the penalty would be less than ten years but greater than three." The question becomes "how do you determine who plays the minor role, who plays the major role … and how do you apply those different bands of crimes?" he says.

Ling explains that the court would have "some discretion but the law as it was written has a good deal of ambiguity which the court needs to sort out."

"I think another case that people are really looking to is the Jimmy Lai case … [he] was charged with collusion with foreign hostile forces and that is another major crime under the *National Security Law* … how the elements of that crime and how the penalty for that crime would be determined, that's an ongoing case that people are looking forward to," says Ling.

The World Justice Project publishes an annual Rule of Law Index ranking countries from around the world in terms of their observance of the rule of law. The index considers a number of factors including government powers, level of corruption, fundamental rights, order and security and regulatory enforcement.

In the Rule of Law Index 2023, Denmark was ranked number one in the world for their adherence to the rule of law, followed by Norway, Finland and Sweden. Australia was ranked 13th, the United Kingdom 15th. Hong Kong was ranked 23rd, and China was ranked 97th in the world for their adherence to the rule of law.

Notwithstanding concerns over the rule of law in Hong Kong, it is still ranked ahead of nations like the United States of America which is ranked 26th in the world.

On other measures though, Hong Kong is viewed less favourably. In the World Press Freedom Index compiled by RSF (Reporters Without Borders), it is ranked 135th. RSF says the major independent news outlets have been forced to close and the *National Security Law* has been used to gag independent voices.

Looking ahead to 2047

Hong Kong has undergone significant changes in the past two centuries. Since its return to Chinese sovereignty 27 years ago, it has experienced great social and legal changes.

It is in a unique position in the Asia-Pacific region. It is a nation shaped by a fusion of cultures and it has maintained a delicate balance between two different legal and political systems.

Recent civil and social unrest led to stringent national security laws being imposed. This has ignited concerns from legal experts and members of the judiciary in Hong Kong as to whether the rule of law has been preserved.

While the Standing Committee has been granted certain powers under the Basic Law, the Basic Law tries to also maintain Hong Kong's freedom consistent with the terms of the Joint Declaration which was determined almost four decades ago. The guarantees contained within the Basic Law will remain in force until 2047. It is unclear what will happen in 23 years' time, but the world will be watching.